83308-7

COURT OF APPEALS
07 SEP -2 PM 1:52
STATE OF WASHINGTON
BY

No. 36562-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nathaniel Ish,

Appellant.

Pierce County Superior Court

Cause No. 05-1-01516-2

The Honorable Judge Thomas J. Felnagle

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (866) 499-7475

P.M. 9/2/2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. ISH'S CONSTITUTIONAL PRIVILEGE AGAINST SELF INCRIMINATION BY ADMITTING HIS CUSTODIAL STATEMENTS.

Custodial statements must pass two tests prior to being admitted against an accused person in a criminal trial. These two tests are the due process voluntariness test and the *Miranda* test. *See State v. Nelson*, 108 Wn. App. 918 at 924, 33 P.3d 419 (2001). Although both tests involve inquiry into voluntariness, the tests are distinct for obvious reasons: a person who voluntarily waives *Miranda* may nonetheless give a statement coerced by threats, violence, promises, or drugs. Respondent focuses on the voluntariness of Mr. Ish's *Miranda* waiver, and fails to analyze the statements under the due process voluntariness test. Brief of Respondent, pp. 10-12.

The three cases upon which Respondent relies do not help the state's position. One of the three refers only to the *Miranda* test. Brief of Respondent at 11, *citing State v. Turner,* 31 Wn. App. 843, 644 P.2d 1224 (1982). The case makes no mention of the due process test of voluntariness; furthermore, the Court of Appeals affirmed the trial court's decision based on unchallenged findings of fact. *Turner,* at 845-846.

The other two cases cited by Respondent support Mr. Ish's position. Brief of Respondent, pp. 10-12, *citing State v. Aten*, 130 Wn.2d

640, 927 P.2d 210 (1996); *and State v. Gregory,* 79 Wn.2d 637, 488 P.2d 757 (1971), *overruled on other grounds by State v. Rogers,* 83 Wn.2d 553, 520 P.2d 159 (1974). In *Aten*, the accused (who was not in custody and who initiated contact with law enforcement) had been administered an anti-anxiety medication called Librax. The treating physician testified that "he would not expect Librax to impair a person's ability to make judgments or decisions or impair a person's alertness and awareness, but that two possible adverse reactions to the drug could be confusion or drowsiness." *Aten,* at 649. The evidence established that Ms. Aten was neither confused nor drowsy at the time of her statement, and the Supreme Court found this sufficient to show that she was not influenced by the medication. *Aten, at* 664-665.

Similarly, in *Gregory, supra,* the accused had been administered Demerol and Codeine. The expert testimony on the "hypothetical effects of the drugs was equivocal." *Gregory, at* 760. By contrast, the participants gave clear but conflicting evidence. After noting that such cases "must, necessarily depend upon the unique facts of the case," the Court of Appeals held that "it was not error for the trial court to disbelieve appellant, to believe the officers' version of the interview, and to rule that appellant's waiver – and his decision to talk with the officers – was made

voluntarily, knowingly, and intelligently and that his statements were the product of a rational intellect and free will." *Gregory, at* 643.

In both *Aten* and *Gregory*, some evidence was presented to the trial court showing the potential effects of the drugs on the accused person. In *Aten*, it was the doctor's testimony about potential side effects; in *Gregory*, it was the equivocal testimony about the drugs' "hypothetical effects." Here, by contrast, the state elected not to identify the "unknown sedative" for the judge at the CrR 3.5 hearing, much less present testimony on its potential side effects or how it might act in combination with alcohol, marijuana, cocaine, and methamphetamine. Once the evidence established that Mr. Ish had ingested alcohol, illegal drugs, and the unknown sedative (later proved to be Haldol), the state was obligated to show that the combined effect of these drugs had no effect on his willpower. If these factors (alone or in combination with the hospital setting, physical restraints, and police presence) made him even a fraction more compliant and cooperative than he would have been otherwise, then his statements do not meet the due process test for voluntariness, and should have been excluded at trial.

When an accused person is administered drugs prior to questioning, admission of statements turns on "whether the statements were the product of a rational intellect and a free will." *Turner,* at 845;

see also Gregory at 642. In this case, the trial court only focused on the first factor—whether Mr. Ish was possessed of a rational intellect at the time of his statements. CP 10-14. Respondent, like the trial court, fails to address the issue of free will. Instead, Respondent cites evidence in the record suggesting that Mr. Ish was rational, and describes him as "engaging in cognitive processes," "cogent enough," and "in full possession of his mental faculties." Brief of Respondent, pp. 12-14.

Even assuming that Mr. Ish was perfectly rational, the evidence does not establish that his free will was intact. Respondent is unable to point to anything in the record suggesting that the circumstances had no impact on Mr. Ish's free will. In the absence of such evidence, Mr. Ish's conviction must be reversed and his statements suppressed. *Gregory, supra; Aten, supra.*

II. THE TRIAL JUDGE VIOLATED MR. ISH'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES BY LIMITING HIS CROSS-EXAMINATION OF THE JAILHOUSE INFORMANT.

Polygraph-related evidence is admissible if offered for a limited purpose other than to bolster the examinee's credibility. *See, e.g., U.S. v. Allard*, 464 F.3d 529 at 534 (5th Cir. 2006); *United States v. A & S Council Oil Co.*, 947 F.2d 1128 (4th Cir. 1991); *U.S. v. Lynn*, 856 F.2d 430 at 433 (1st Cir. 1988). Contrary to Respondent's assertion (Brief of Respondent, p. 16), Washington courts have recognized that polygraph

results may be admitted for limited purposes other than to prove truthfulness. *State ex rel. Taylor v. Reay*, 61 Wn. App. 141, 810 P.2d 512 (1991).

Mr. Ish sought to cross-examine the informant regarding his agreement to take a polygraph as part of his contract with the state. He did not ask to introduce the results of a polygraph, and he certainly didn't wish to prove the informant's truthfulness. The evidence was relevant, and should have been admitted for a limited purpose.

First, the jury was informed that the agreement included a promise to tell the truth. Exhibit 121. As outlined in Mr. Ish's Opening Brief, this evidence suggested to the jury that the state had some independent and objective method of verifying the truth of his testimony. *See* Appellant's Opening Brief, pp. 24-27. It would have been helpful for the defense to show that the state relied on a truth-testing method so unreliable as to be inadmissible in court.

Second, Mr. Ish wished to show that the informant knew his statements would not be tested by polygraph because the prosecution never enforced the polygraph clause in its agreement. With this knowledge, the informant could lie about Mr. Ish in his testimony without fear of having his agreement revoked. RP (4/17/07) 186-187. Respondent's claim that "[t]here was no reason for either side to explore

the inadmissible polygraph requirement" is therefore incorrect. Brief of Respondent, p. 16.

The trial judge's refusal to allow cross-examination about the informant's understanding of the polygraph requirement violated Mr. Ish's constitutional right to confrontation. The conviction must be reversed and the case remanded to the trial court for a new trial. *State v. York*, 28 Wn.App. 33, 621 P.2d 784 (1980).

III. THE TRIAL COURT ALLOWED THE PROSECUTOR TO VOUCH FOR THE INFORMANT AND THEREBY VIOLATED MR. ISH'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

Constitutional error is presumed to be prejudicial; to overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Gonzales Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008). Under the due process clause, an accused person "is entitled to have his [or her] guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478 at 485, 98 S.Ct. 1930, 56 L.Ed.2d. 468 (1978); U.S. Const. Amend. XIV.

In this case, the trial court admitted evidence that the informant promised the state he would testify truthfully. Exhibit 121; RP (5/9/07) 1104. This suggested that the state had some independent and objective means of determining the truth.[1] *See United States v. Roberts,* 618 F.2d 530 at 536 (9th Cir.1980). But no evidence was introduced regarding the prosecutor's ability to test the informant's veracity. *See* RP, *generally.*

By allowing the prosecutor to suggest that the state had some objective method, not admitted at trial, of verifying the informant's testimony, the trial judge violated Mr. Ish's constitutional right to due process. *Taylor v. Kentucky, supra.* This violation is presumed to be prejudicial. *Gonzales Flores, supra.* Respondent's argument that an abuse of discretion standard applies, and that the appellant bears the burden of establishing prejudice is incorrect. Brief of Respondent, pp. 17-18. Whether the fault lies with the trial court (for admitting the evidence) or the prosecutor (for introducing it), the error violated a constitutional right and is presumed prejudicial. *Taylor v. Kentucky, supra; Gonzales Flores, supra.* Accordingly, the burden is on the state to show beyond a reasonable doubt that the error was trivial, formal, or merely academic,

---

[1] Of course, the only independent means of testing the truth of the informant's testimony was polygraphy—a method so unreliable as to be admissible in court. Unfortunately, Mr. Ish was not permitted to explain this to the jury or to cross-examine the informant on this part of his agreement with the state. *See* previous section.

that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Gonzales Flores, supra.*

Outside the presence of the jury, Mr. Ish sought to preclude the state from introducing the evidence. RP (5/9/07) 1079-1082. After the court ruled against him, he was not required to pose an additional objection in front of the jury; his unsuccessful motion *in limine* preserved the error. *See State v. Thang*, 145 Wn.2d 630 at 648, 41 P.3d 1159 (2002). Respondent's argument that the "error is waived unless the questions are flagrant and ill-intentioned" is incorrect. Brief of Respondent, p. 20. Under *Thang,* Mr. Ish was entitled to rely on the trial court's ruling *in limine*.

U.S. v. Roberts, supra, illustrates the problem created by this type of indirect vouching. Respondent seeks to distinguish *U.S. v. Roberts* (Brief of Respondent, pp. 21, 25-26), but fails to address any of the other cases on which Mr. Ish relies. *See* Appellant's Opening Brief at 28, *citing United States v. Simtob*, 901 F.2d 799 (9th Cir. 1990); *United States v. Brown*, 720 F.2d 1059 (9th Cir. 1983); *and United States v. Rudberg*, 122 F.3d 1199 (9th Cir. 1997); *see also United States v. Frederick*, 78 F.3d 1370 (9th Cir. 1996). These cases all share the same core facts as Mr. Ish's case: the government suggested that it had some independent means of verifying the informant's truthfulness.

Nor did the evidence serve to rebut an attack on the informant's credibility. Prior to testifying, the informant took an oath to testify truthfully; his earlier promise to the prosecution was less important than his oath *unless* the prosecution had some means of verifying his truthfulness. By admitting the evidence, the trial court allowed the jury to believe that the informant's earlier promise to the prosecution added something to the case, beyond the informant's oath.

The problem was magnified by the prosecuting attorney's misconduct in closing. The prosecutor's argument that the state was seeking "justice" and "the truth" was not a proper response to defense counsel's closing argument. Defense counsel asked the jury to hold the state to its burden instead of uncritically granting the state's "desire" to "take away" Mr. Ish's "freedom." RP (5/21/07) 1437. By referring to the state's hope to imprison Mr. Ish, defense counsel did no more than point out the obvious: that punishment—including loss of freedom—follows conviction.[2] If the state did not wish to see Mr. Ish confined, presumably it would have dismissed the charges. Defense counsel's comments were not an invitation to the prosecutor to wrap a "cloak of righteousness"

---

[2] Inexplicably, Respondent argues without citation to authority that defense counsel's arguments were "clearly a mischaracterization of the role of the State and the role of a trial." Brief of Respondent, p. 23.

around herself in closing. *See, e.g., State v. Gonzales*, 111 Wn.App. 276 at 283, 45 P.3d 205 (2002); *U.S. v. Vaccaro*, 115 F.3d 1211 (1997).

This misconduct might have been insufficient, on its own, to warrant reversal, in light of the court's curative instruction. However, by ringing the bell of truth and justice, the prosecutor reassured the jury that she would not enter a plea agreement with an untrustworthy witness. This message must have lingered in each juror's subconscious, because "[a] bell once rung cannot be unrung." *State v. Easter*, 130 Wn.2d 228 at 230-239, 922 P.2d 1285 (1996), *internal citations omitted.*

The vouching error, compounded by the misconduct in closing, was not harmless beyond a reasonable doubt; Respondent has failed to show that it was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Gonzales Flores, supra.* In addressing harmless error, Respondent points out—correctly, but irrelevantly—that the evidence that Mr. Ish killed Ms. Hall was overwhelming. Brief of Respondent, p. 25. The sole issue at trial was Mr. Ish's mental state. On this issue, the evidence was not overwhelming, and the informant's testimony was a key component of the state's proof. The informant testified (1) that Mr. Ish admitted breaking Ms. Hall's neck, (2) that he felt like he was "punching holes through her," and (3) that he planned to lie by saying he couldn't

remember the incident. RP (5/9/07) 1092, 1093, 1095. This added to the evidence that Mr. Ish acted intentionally and/or recklessly. By suggesting that the government could monitor the informant's out-of-court promise to testify truthfully, and by inappropriately claiming to seek truth and justice, the prosecutor improperly influenced the outcome of the trial. The error was not trivial, formal, or merely academic, and the prosecutor cannot prove that it did not prejudice Mr. Ish and in no way affected the final outcome of the case. *Gonzales Flores, supra.*

Because the error was not harmless, Mr. Ish's conviction must be reversed and the case remanded for a new trial. *Roberts, supra.*

IV. THE PROSECUTOR'S FAILURE TO PROVIDE DISCOVERY DEPRIVED MR. ISH OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND DENIED HIM A FAIR TRIAL.

Due process requires timely disclosure of the evidence the government will use at trial. U.S. Const. Amend. XIV; *State v. Greiff*, 141 Wn.2d 910 at 920, 10 P. 3d 390 (2000). A new trial must be granted whenever there is a substantial likelihood late disclosure affected the jury's verdict. *Greiff at* 923; *see also State v. Copeland*, 89 Wn. App. 492 at 497-498, 949 P.2d 458 (1998). It is fundamentally unfair to wait until mid-trial to disclose damning evidence known to the police since the beginning of an investigation.

The failure to timely disclose the Lakewood Police Department's knowledge of the Lifeline recording violated Mr. Ish's constitutional right to due process. Respondent's focus on the letter of the discovery rule ignores the constitutional claim raised in the Opening Brief. Brief of Respondent, pp. 34-36.

Mr. Ish was prejudiced by the mid-trial disclosures. The recording contained Ms. Lynn's screams and Mr. Ish's own calm voice; this combination likely inflamed the passions and prejudices of the jurors while simultaneously undermining Mr. Ish's mental health defense. Exhibit 129. Mr. Ish had no time to investigate or develop a coherent strategy to oppose admission of the recording nor to blunt its impact.

There is a substantial likelihood that the violation affected the jury's verdict. Because of this, the conviction must be reversed and the case remanded for a new trial. *Greiff, supra.*

V. THE TRIAL JUDGE ERRED BY ADMITTING THE LIFELINE CONTRACT AND AUDIO RECORDING OVER MR. ISH'S OBJECTIONS.

A. The trial judge erroneously admitted the Lifeline recording under a nonexistent exception to the rule against hearsay.

Respondent concedes that the "res gestae" exception no longer exists, arguing that it has been "simplified" and subsumed by the "present sense impression" exception contained in ER 803(1). Brief of

Respondent, pp. 29-31. But the recorded statements do not describe or explain an event or condition, as required under ER 803(1). Furthermore, the state failed to lay the foundation for admission under the "excited utterance" exception, as Respondent suggests. ER 803(a)(2). Brief of Respondent, p. 30.

The trial judge's decision admitting the Lifeline recording was erroneous. Respondent has not attempted to argue that the error was harmless; therefore, Mr. Ish's conviction must be reversed and the case remanded for a new trial.

B. The trial judge erroneously admitted the Lifeline recording in violation of the Privacy Act.

Mr. Ish's conversation with the Lifeline operator was a "private communication transmitted by telephone, telegraph, radio, or other device." RCW 9.73.030(1)(a). Recording was therefore prohibited without his consent. RCW 9.73.030(1)(a). Respondent suggests that the "call was of an emergency nature as the systems [sic] is designed for emergency reporting..." Brief of Respondent, p. 28. Respondent's interpretation of the emergency exception to the Privacy Act is incorrect.

The Privacy Act is to be interpreted "in a manner that ensures that the private conversations of this state's residents are protected in the face of an ever-changing technological landscape." *State v. Christensen,* 153

Wn.2d 186 at 197, 102 P.3d 789 (2004). Under the emergency exception, "wire communications or conversations... of an emergency nature" may be recorded with the consent of only one party to the conversation. RCW 9.73.030(2). The exception "must be strictly construed," to give effect to the legislature's intent to protect private conversations. *State v. Williams*, 94 Wn.2d 531 at 548, 617 P.2d 1012 (1980).

Under its plain language, the phrase "conversations... of an emergency nature" requires examination of the content of any conversation recorded. The statute gives examples: "the reporting of a fire, medical emergency, crime, or disaster..." RCW 9.73.030(2). Under a strict reading of the statute, this Court may not consider the purpose of a Lifeline "call," nor may it consider the reason the "system" was designed. Respondent's focus on the "call" and the "system" are misplaced. Brief of Respondent, at 28.

Mr. Ish did not have a conversation "of an emergency nature" with the Lifeline operator. Exhibit 128. He did not report a fire, medical emergency, crime, or disaster. Instead, he reassured the operator that everything was fine. Exibhit 128. Because of this, the emergency exception does not apply, and the recording was illegal absent the consent of "all the participants," including Mr. Ish. RCW 9.73.030.

Furthermore, even if the conversation qualifies under the emergency exception, the state was still required to demonstrate that one person consented to the recording. RCW 9.73.030(2). Respondent claims that "it seems very reasonable that they [Lifeline] consented to the recording." Brief of Respondent, p. 28. But the Privacy Act requires strict compliance. *See, e.g., Lewis v. Dep't of Licensing,* 157 Wn.2d 446 at 465, 139 P.3d 1078 (2006). The prosecution did not produce the operator whose voice appears on the recording; nor did it provide any evidence of that person's consent. In the absence of such proof, the recording should have been excluded. RCW 9.73.030.

C. The trial judge erroneously admitted the Lifeline contract and audio recording without proper authentication.

The court should not have allowed Exhibit 131, the unsigned computer printout "copy" of Ms. Lynn's contract, to be admitted through the testimony of Mark Van Gemert. Mr. Van Gemert had not signed Ms. Lynn up for the program, had not seen the original contract, had not supervised the creation of the printout, did not know how it was stored, retrieved, or created, and had not seen it until presented with it in the prosecutor's office. RP (5/17/07) 1312, 1317-1319. No hearsay exception is broad enough to allow admission of the document under these circumstances. Respondent fails to address admission of the contract, and

apparently does not disagree that it was error. *See* Brief of Respondent, p. 31, *heading* ("The court did not error [sic] in admitting the Lifeline *recording* after proper authentication," *emphasis added.*)

The court also erred in admitting the recording. Mr. Van Gemert did not know how the company generated or stored audio, did not know how this particular recording had been retrieved or copied, did not receive the recording from anyone at Lifeline (having seen it for the first time in the prosecutor's office), did not know the "operator," could not confirm the "operator" worked for Lifeline, could not testify that the recording was authentic, and did not testify that the recording was complete and had not been tampered with. RP (5/17/07) 1328-1330, 1332. Similarly, the other foundational witness (Michael Smith) did not confirm that the recording was complete, that it hadn't been tampered with, or that it was authentic. RP (5/17/07) 1337-1342.

This evidence was insufficient to meet the minimal standards for authentication. Respondent has not attempted to argue that admission of the recording was harmless; accordingly, the conviction must be reversed and the case remanded for a new trial, with instructions to exclude the recording unless the prosecution properly authenticates it. *See State v. Everybodytalksabout*, 145 Wn.2d 456 at 468-469, 39 P.3d 294 (2002).

VI. MR. ISH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED A DEFINITION OF "RECKLESSNESS" THAT CONTAINED A MANDATORY PRESUMPTION, CONFLATED TWO MENTAL STATES, AND RELIEVED THE PROSECUTION OF ITS BURDEN OF PROVING AN ESSENTIAL ELEMENT OF SECOND-DEGREE FELONY MURDER.

Mr. Ish's ineffective assistance claim rests on *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). The Supreme Court has accepted review of the issue raised in *Goble*. *State v. Sibert, review granted at* 163 Wn.2d 1059 (2008). Accordingly, Mr. Ish rests on the argument raised in the Opening Brief.

CONCLUSION

Mr. Ish's conviction must be reversed and the case remanded to the trial court for a new trial, with instructions to suppress his statements, permit cross-examination of the informant regarding the polygraphy clause of his plea agreement, exclude evidence that the informant promised to tell the truth as part of his agreement, and exclude the Lifeline recording.

Respectfully submitted on September 2, 2008.

BACKLUND AND MISTRY

Jodi R. Backlund, No. 22917
Attorney for the Appellant

Manek R. Mistry, No. 22922
Attorney for the Appellant

COURT OF APPEALS
DIVISION II
08 SEP -8 PM 1:53
STATE OF WASHINGTON
BY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Nathaniel Ish, DOC# 867788
McNeil Island Corrections Center
P. O. Box 881000
Steilacoom, WA 98388

and to:

Kathleen Proctor
Pierce County Prosecuting Atty Ofc
930 Tacoma Ave. S Rm 946
Tacomas, WA 98402

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 2, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 2, 2008.

Jodi R. Backlund, WSBA No.22917
Attorney for the Appellant